

## CHAPTER 20 WAIVERS AND VARIANCES

### **401—20.1(17A,18) Definitions.**

*“Department”* or *“DGS”* means the department of general services authorized by Iowa Code chapter 18.

*“Director”* means the director of the department of general services or the director’s designee.

*“Person”* means an individual, corporation, limited liability company, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, vendor, or any legal entity.

*“Waiver or variance”* means any action by the department that suspends in whole or in part the requirements or provisions of a rule as applied to an identified person on the basis of the particular circumstances of that person. For simplicity, the term “waiver” shall include both a “waiver” and a “variance.”

**401—20.2(17A,18) Scope.** This chapter outlines generally applicable standards and a uniform process for the granting of individual waivers from rules adopted by the department in situations where no other more specifically applicable law provides for waivers. To the extent another more specific provision of law governs the issuance of a waiver from a particular rule the more specific provision shall supersede this chapter with respect to any waiver from that rule.

**401—20.3(17A,18) Applicability.** The department may grant a waiver from a rule only if the department has jurisdiction over the rule and the requested waiver is consistent with applicable statutes, constitutional provisions, or other provisions of law. The department may not waive requirements created or duties imposed by statute.

**401—20.4(17A,18) Granting a waiver.** In response to a petition completed pursuant to rule 20.6(17A,18) or on the director’s own motion, the director may, in the director’s sole discretion, issue an order waiving in whole or in part the requirements of a rule.

**20.4(1) Criteria for waiver or variance.** A waiver may be granted if the director finds based on clear and convincing evidence each of the following:

*a.* The application of the rule would pose an undue hardship on the person for whom the waiver is requested;

*b.* The waiver from the requirements of the rule in the specific case would not prejudice the substantial legal rights of any person;

*c.* The provisions of the rule subject to the petition for a waiver are not specifically mandated by statute or another provision of law; and

*d.* Substantially equal protection of public health, safety, and welfare will be afforded by a means other than that prescribed in the particular rule for which the waiver is requested.

In determining whether a waiver should be granted, the director shall consider the public interest, policies and legislative intent of the statute on which the rule is based. When the rule from which a waiver or variance is sought establishes administrative deadlines, the director shall balance the special individual circumstances of the petitioner with the overall goal of uniform treatment of all affected persons.

**20.4(2) Special waiver or variance of rules not precluded.** These waiver and variance rules shall not preclude the director from granting waivers or variances in other contexts or on the basis of other standards if a statute or other department rule authorizes the director to do so and the director deems it appropriate to do so.

**20.4(3) *Procurement-related waiver or variance.*** The director may waive a rule or grant a variance due to noncompliance with a stated requirement in a procurement, sale, or auction if the request meets all of the following criteria:

- a. The request is made prior to the issuance of a notice of intent to award a contract or the finalization of a sale.
- b. The waiver or variance will tend to promote competition rather than inhibit or reduce competition.
- c. The waiver or variance will not materially alter the substantive contents of the offer, a response to an invitation to bid or a response to a request for proposal.
- d. The noncompliance with the stated requirement is correctable (if correction is necessary) without materially or substantially altering the substantive contents of the offer, a response to an invitation to bid or a response to a request for proposal.
- e. No other person who submits an offer, a response to an invitation to bid or a response to a request for proposals is materially or substantially harmed by the waiver or variance. A person shall not be deemed to have been harmed if the waiver or variance merely increases competition.
- f. Fundamental notions of good faith and fair dealing favor the issuance of a waiver or variance.
- g. The waiver or variance will not result in unreasonable delay in the procurement, sale or auction and will not interfere with certainty or finality in the procurement, sale or auction.

If the stated terms of the procurement, sale or auction permit or authorize waiver or variance from the stated terms, the director may waive or vary the stated terms without regard to subrule 20.4(1).

**20.4(4) *Special waiver or variance not permitted.*** The compensation rates for publication in a newspaper for any notice, order or citation or other publication required or allowed by law as determined by the state printing administrator pursuant to Iowa Code section 618.11 shall not be waived or varied. The procedure established in this chapter does not apply to waiver or variance of contractual terms or conditions; contracts shall be waived or varied only upon their own terms. These rules do not apply to the Terrace Hill commission established in Iowa Code section 18.8A or rules adopted by the commission unless these rules are adopted by the Terrace Hill commission.

**401—20.5(17A,18) Filing of petition for waiver.** A petition for a waiver must be submitted in writing to the Iowa Department of General Services, Office of the Director, Hoover State Office Building, Level A, Des Moines, Iowa 50319-0104, Attention: Legal Counsel. Requests for waiver may be delivered, mailed, sent by facsimile transmission or by other electronic means reasonably calculated to reach the intended recipient.

**20.5(1) *Appeals.*** If the petition relates to a pending appeal, a copy of the petition shall also be filed in the appeal.

**20.5(2) *Other.*** If the petition does not relate to an appeal, the petition will be submitted to the department's legal counsel.

**401—20.6(17A,18) Content of petition.** A petition for waiver or variance shall include the following information where applicable and known to the requester:

1. The name, address, and telephone number of the entity or person for whom a waiver is being requested, and the case number of any related pending appeal.
2. A description and citation of the specific rule (and the stated requirement in a procurement, auction or sale) from which a waiver is requested.
3. The specific waiver requested, including the precise scope and duration.
4. The relevant facts that the petitioner believes would justify a waiver under each of the four criteria described in subrule 20.4(1) or the criteria in subrule 20.4(3) if the request relates to a procurement, sale or auction. This statement shall include a signed statement from the petitioner attesting to the accuracy of the facts provided in the petition, and a statement of reasons that the petitioner believes will justify the waiver.

5. A history of any prior contacts between the department and the petitioner relating to the activity that is the subject of the requested waiver.
6. Any information known to the requester regarding the department's treatment of similar cases.
7. The name, address, and telephone number of any public agency or political subdivision which also regulates the activity in question, or which might be affected by the granting of a waiver.
8. The name, address, and telephone number of any entity or person who would be adversely affected by the granting of a petition, if reasonably known to the petitioner.
9. The name, address, and telephone number of any person with knowledge of the relevant facts relating to the proposed waiver.
10. Signed releases of information authorizing persons with knowledge regarding the request to furnish the department with information relevant to the waiver or variance.

**401—20.7(17A,18) Additional information.** Prior to issuing an order granting or denying a waiver, the department may request additional information from the petitioner relative to the petition and surrounding circumstances. If the petition was not filed in conjunction with an appeal, the director may, on the director's own motion or at the petitioner's request, schedule a telephonic or in-person meeting between the petitioner and the director.

**401—20.8(17A,18) Notice.** The department shall acknowledge the receipt of a petition by written means reasonably calculated to reach the petitioner or designee. The department shall ensure that, within 30 days of the receipt of the petition, notice and a concise summary of the content of the petition have been provided to all persons to whom notice is required by any provision of law. In addition, the department may give notice to other persons.

To accomplish this notice provision, the department may require the petitioner to serve the notice on all persons to whom notice is required by any provision of law, and provide a written statement to the department attesting that notice has been provided.

**401—20.9(17A,18) Hearing procedures.** The provisions of Iowa Code sections 17A.10 to 17A.18A regarding contested case hearings shall apply in three situations: (1) to any petition for a waiver or variance of rule filed within a contested case; (2) when the director so provides by rule or order; or (3) when a statute so requires.

**401—20.10(17A,18) Ruling.** An order granting or denying a waiver or variance shall be in writing and shall contain a reference to the particular person and rule or portion thereof to which the order pertains, a statement of the relevant facts and reasons upon which the action is based, and a description of the precise scope and duration of the waiver if one is issued.

**20.10(1) Director discretion.** The final decision on whether the circumstances justify the granting of a waiver shall be made at the sole discretion of the director, upon consideration of all relevant factors. Each petition for waiver shall be evaluated by the director based on the unique, individual circumstances set out in the petition.

**20.10(2) Burden of persuasion.** If the petition for waiver is based on a request pursuant to subrule 20.4(1), the burden of persuasion rests with the petitioner to demonstrate by clear and convincing evidence that the director should exercise discretion to grant a waiver from a department rule.

**20.10(3) Narrowly tailored exception.** A waiver, if granted, shall provide the narrowest exception possible to the provisions of a rule.

**20.10(4) Administrative deadlines.** When the rule from which a waiver or variance is sought establishes administrative deadlines, the director shall balance the special individual circumstances of the petitioner with the overall goal of uniform treatment of all affected persons.

**20.10(5) Conditions.** The director may place any condition on the waiver that the director finds desirable to protect the public health, safety, and welfare.

**20.10(6) Time period of waiver.** A waiver shall not be permanent unless the petitioner can show that a temporary waiver would be impracticable. If a temporary waiver is granted, there is no automatic right to renewal. At the sole discretion of the director, a waiver may be renewed if the director finds that grounds for a waiver continue to exist.

**20.10(7) Time for ruling.** The director shall grant or deny a petition for a waiver or variance as soon as practicable but, in any event, shall do so within 120 days of its receipt, unless the petitioner agrees to a later date. However, if a petition is filed in an appeal, the director shall grant or deny the petition no later than the time at which the final decision in that appeal is issued.

**20.10(8) When deemed denied.** Failure of the director to grant or deny a petition within the required time period shall be deemed a denial of that petition by the director. However, the director shall remain responsible for issuing an order denying a waiver.

**20.10(9) Service of order.** Within seven days of its issuance, any order issued under this chapter shall be transmitted to the petitioner or the person to whom the order pertains, and to any other person entitled to such notice by any provision of law.

**401—20.11(17A,18) Public availability.** All orders granting or denying a waiver petition shall be indexed, filed, and available for public inspection as provided in Iowa Code section 17A.3. Petitions for a waiver and orders granting or denying a waiver petition are public records under Iowa Code chapter 22. Some petitions or orders may contain information the department is authorized or required to keep confidential. The director may accordingly redact confidential information from petitions or orders prior to public inspection.

**401—20.12(17A,18) Summary reports.** Semiannually, the director shall prepare a summary report identifying the rules for which a waiver has been granted or denied, the number of times a waiver was granted or denied for each rule, a citation to the statutory provisions implemented by these rules, and a general summary of the reasons justifying the director's actions on waiver requests. If practicable, the report shall detail the extent to which the granting of a waiver has affected the general applicability of the rule itself. Copies of this report shall be available for public inspection and shall be provided semiannually to the administrative rules coordinator and the administrative rules review committee.

**401—20.13(17A,18) Cancellation of a waiver.** A waiver issued by the director pursuant to this chapter may be withdrawn, canceled, or modified if, after appropriate notice and hearing, the director issues an order finding any of the following:

1. The petitioner or the person who was the subject of the waiver order withheld or misrepresented the material facts relevant to the propriety or desirability of the waiver;
2. The alternative means for ensuring that the public health, safety and welfare will be adequately protected after issuance of the waiver order have been demonstrated to be insufficient; or
3. The subject of the waiver order has failed to comply with all conditions contained in the order.

**401—20.14(17A,18) Violations.** Violation of a condition in a waiver order shall be treated as a violation of the particular rule for which the waiver was granted. As a result, the recipient of a waiver under this chapter who violates a condition of the waiver may be subject to the same remedies or penalties as a person who violates the rule at issue.

**401—20.15(17A,18) Defense.** After the director issues an order granting a waiver, the order is a defense within its terms and the specific facts indicated therein for the person to whom the order pertains in any proceeding in which the rule in question is sought to be invoked.

**401—20.16(17A,18) Judicial review.** Judicial review of the department's decision to grant or deny a waiver petition may be taken in accordance with Iowa Code chapter 17A.

These rules are intended to implement Iowa Code section 17A.9A.

[Filed 5/21/01, Notice 2/21/01—published 6/13/01, effective 7/18/01]